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Issue Date: 28 June 2005

CASE NO.: 2004-LHC-309

OWCP NO.: 07-163557

IN THE MATTER OF

ROBERT ANDREPONT,
Claimant

v.

MURPHY EXPLORATION & PRODUCTION CO.,
Employer

and

LIBERTY MUTUAL INSURANCE CO.,
Carrier

APPEARANCES:

Ed W. Barton, Esq.
On behalf of Claimant

Douglas P. Matthews, Esq.
On behalf of Employer/Carrier

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Robert Andrepont (Claimant) against Murphy Exploration & Production Company (Employer) and Liberty Mutual Insurance Company (Carrier). The formal hearing was conducted in Lafayette, Louisiana on April 5, 2005. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-10, and Employer/Carrier's Exhibits 1-26 and 28. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The date of injury/accident was May 14, 1999;
2. The injury was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the accident;
4. Employer was advised of the injury on May 14, 1999;
5. Date of Notice of Controversion filed is not applicable;
6. The date of the informal conference was September 25, 2003;
7. The average weekly wage at the time of injury was $1,302.48;
8. Nature and extent of disability:
   (a) Temporary total disability: April 22, 2000 to December 12, 2001;
   (b) Benefits were paid from April 22, 2000 to December 12, 2001;
   (c) Medical benefits have been paid;
9. Permanent disability to the leg is 26 percent;
10. The date of maximum medical improvement was December 12, 2001.

[1] The parties were granted time post hearing to file briefs. This time was extended up to and through June 17, 2005.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, p.__"; Employer's Exhibit- "EX __, p.__"; and Claimant's Exhibit- "CX __, p.__".

Issues

The unresolved issues in this proceeding are:

1. Nature and extent of disability;
2. Attorney's fees and interest.

Statement of the Evidence

Testimony of Robert L. Andrepont

Claimant is sixty years old and was raised in Sulphur, Louisiana, where he obtained a seventh-grade education, and where he currently resides. Claimant worked for Employer for twenty-eight years prior to his injury, primarily as a "Mechanic A" on offshore oilrigs and platforms. Tr. 11.

Claimant was aware that Employer possessed a personnel file which contained documents relating to Claimant. He stated that one document in the file indicated that Claimant received a GED from Sulphur High School, which Claimant said is not correct. EX 9. Claimant testified that he viewed this document at his deposition. He believed he knew how the document was placed in his personnel file; when he was being promoted to maintenance foreman, one of Employer's employees knew that Claimant did not have a high school education but said he would "tend to that" for Claimant, gave him an envelope and asked Claimant to mail it. Tr. 13.

Claimant has only received medical care from Dr. Drez for his knee injury, which he sustained when he hit it on a ladder at work on May 14, 1999. He had five surgical procedures on his left knee, and at the time of the hearing was waiting to have a knee replacement performed. Claimant said that his knee pops and swells, and he cannot balance, kneel, stoop, squat or run. Tr. 14. Claimant recalled that Dr. Drez recommended Claimant undergo a series of injections, but Claimant did not immediately do so. Claimant eventually received the injections but obtained no relief from them. Tr. 17. Claimant requested pain medication from Dr. Drez, but he refused to prescribe it, instead referring Claimant to his family physician for medications, but Claimant did not make such a request.

To relieve his pain, Claimant takes the strongest over-the-counter Tylenol he can, as well as Ibuprofen. He stated neither medication provides him relief, and the pain interferes with his daily functioning. Claimant described his pain as

nagging, "like a toothache," which never goes away. His pain also interferes with his ability to sleep at night. Tr. 19.

Claimant did not believe he could work any job on a regular basis, because he could neither sit nor stand for an extended period of time, and because the pain would interfere with his ability to focus on his tasks. Claimant recalled he had worked with Mr. Scott Landry, a vocational rehabilitation counselor. He said Mr. Landry provided him with one job lead: a desk clerk position at the Holiday Inn Express in Sulphur, Louisiana. Claimant completed an application for employment, but said he was never contacted by the employer. Tr. 21. Claimant testified he would disagree if Mr. Landry stated he provided Claimant with three job leads rather than one. Claimant had not been informed of any other possible employment, aside from the position at Holiday Inn Express. Tr. 22.

Claimant lived in Sulphur for most of his life, until he moved to Orange, Texas for two years. Claimant, a widower, met a widow with whom he spent time and moved with her to Texas. He returned to Sulphur ten months prior to the hearing. His friend sold her house in Texas, Claimant sold his original house in Sulphur, and they built a house in Sulphur, where Claimant plans to stay. Tr. 24.

On cross-examination, Claimant clarified his work history with Employer, stating that he had been an "A" mechanic for eight to ten years. Tr. 25. An "A" mechanic was the highest-level offshore mechanic Employer employed aside from a mechanic foreman. Claimant progressed through other mechanic levels before reaching "A" status. He acknowledged that in order to progress, he had to study some information and take certain tests. He said he read the information and took the tests, but he received answers from other employees; the answers to the tests were passed around in the field. Tr. 26. Claimant took additional tests when he was going through offshore training, including training at Delgado Community College which consisted of four to five day courses. Claimant received training on new pieces of equipment being sent offshore, such as compressors and pumps.

Claimant agreed that the general duties of his position were tending to all compressors, compressor engines, generators, generator engines, air compressors, pipeline pumps, and anything else that needed to be repaired. He also performed some electrical work offshore, and completed reports when a piece of machinery was not working properly. Claimant would write these reports but explained that he required assistance with spelling words. Tr. 32.

Claimant agreed that when he initially applied to work with Odeco, Employer's predecessor, he indicated on his application that he had a tenth grade education, but he had actually completed only through seventh grade. Claimant explained he did so because he needed to work to support his family. Tr. 33. Claimant recalled telling Mr. Landry, the vocational rehabilitation specialist, that he had a seventh grade education and was going to go to eighth grade, so if Mr. Landry's report indicated that Claimant had an eighth grade education, it was an error.

Claimant explained his promotion to maintenance foreman, stating he was approached by Mr. James Guillory, a maintenance foreman, who told Claimant he was aware Claimant did not have a high school education, and would help Claimant because he thought Claimant should receive the promotion. Claimant said he was given a sealed envelope and told to mail it to Mr. Jim Kaigle who was in charge of hiring maintenance foremen. Claimant recalled these events occurring in 1995 or 1996, when Claimant was a mechanic. He was subsequently offered the mechanic foreman position in 1997, but he did not take the job. Claimant explained that he was offered the position and he said he would accept it, but at the time he asked to be "held off" the position and it was not offered to him again. Tr. 37.

As an "A" mechanic, Claimant sometimes operated cranes offshore, for which he had to be certified and recertified every two years by passing a test, which Claimant said he took on his own. Claimant was certified to operate two kinds of cranes. Claimant identified some of the exams he took in order to be certified, located at EX 11.

While Claimant was receiving vocational rehabilitation services from Mr. Landry, Mr. Landry recommended that Claimant apply for a GED course, and requested funds from the insurance company to pay for the course. Claimant admitted that he did not follow through with the process. Tr. 43. Claimant said he met with Mr. Landry "way more" than five times, and at the first few meetings they discussed the possibility of Claimant becoming employed again. Claimant did not recall Mr. Landry asking him to do some job searching on his own, nor did he recall Mr. Landry asking him to spend two hours three days per week searching for jobs. He did not recall signing an Individual Rehabilitation Plan he was shown, located at EX 6, pp. 45-46.

Claimant agreed that Mr. Landry called Claimant about the position at Holiday Inn Express, and Claimant submitted an application for the position in

February or March 2003. He said he called Holiday Inn once to follow-up on his application, approximately one month after he submitted it. Claimant denied that Mr. Landry contacted him in June 2003 to inform him that the position was still open. Claimant said he learned of a position at a Motel 8 from his attorney, and denied ever receiving correspondence from Mr. Landry regarding the position. He applied in September 2003, when he learned of the position, but was told that the position was filled. Claimant said he contacted another employer, U.S. Unwired, about a position in October 2003, but was told applications were not being accepted.

Claimant recalled that Mr. Landry was going to compile a resume for him, but stated he had never seen the resume located at EX 6, p. 47. Claimant did remember taking a Career Assessment Inventory, located at EX 6, p. 30. Claimant said he has his cane with him at all times, but there was one occasion he did not bring his cane when he met with Mr. Landry. Tr. 54. Claimant stated he had not looked for employment on his own, and denied receiving a letter from the Department of Labor regarding vocational rehabilitation services. Tr. 55. Claimant denied working with Ms. Carla Seyler, and stated he had never heard her name before.

Claimant recalled meeting with Mr. William Kramberg on one occasion regarding vocational rehabilitation. He said Mr. Kramberg interviewed him and attempted to administer some tests which Claimant could not complete. Claimant spoke to Mr. Kramberg on the telephone on March 29, 2005, following an appointment with Dr. Drez. Claimant could not recall if Mr. Kramberg told him whether he had identified any employment. Claimant acknowledged that while working for Employer, annual evaluations were conducted regarding his job performance. Claimant said all of his job evaluations were "good." Tr. 65. Claimant clarified that he continued to work after his accident until April 21, 2000, and had not worked since that day. Tr. 69.

Medical Evidence

Deposition and Records of David Drez, Jr., M.D.

Dr. Drez is a board certified orthopedic surgeon who was deposed on February 26, 2004. His deposition is located at Claimant's Exhibit 3; his records are found at Claimant's Exhibit 4. Dr. Drez testified that he initially saw Claimant on September 13, 1999, where Claimant reported an accident had occurred on May 14, 1999, wherein Claimant struck his left knee with a very hard blow on the rung of a ladder. CX 3, p. 7; CX 4, p. 22. When he next saw Claimant on February 15,

2000, Claimant reported that he had been able to return to work for Employer, though he did so with continued knee problems. CX 3, p. 8. Dr. Drez did not recall a significant difference between his initial examination of Claimant and the follow-up in February 2000, though Claimant had tenderness along the area of the medial meniscus which he did not have at the initial examination.

At the February 15, 2000 visit, Dr. Drez ordered an MRI scan which revealed a torn medial meniscus. He subsequently performed arthroscopic surgery, in the form of partial medial meniscectomy and debridement of the medial femoral condyle, on April 24, 2000. CX 4, p. 24. At Claimant's appointment on July 25, 2000, Dr. Drez noted that despite all rehabilitation efforts, Claimant continued to report pain and a feeling of "catching" in the medial compartment of his left knee, which was also observed by the physical therapist, David Qualls. Dr. Drez recommended re-arthroscopy of Claimant's left knee, which was performed on August 16, 2000. CX 4, p. 26.

On September 14, 2000, Dr. Drez recommended a functional capacities evaluation (FCE) to determine whether Claimant could return to his previous employment. On October 5, 2000, based on the results of the FCE and clinical observations, Dr. Drez opined that Claimant was incapable of returning to his previous work. On November 9, 2000, Dr. Drez assigned a 26 percent impairment to Claimant's lower left extremity, discussed treatment options with Claimant, and prescribed an unloader brace, which he explained has hinges on it which force the knee in the opposite direction from where arthritis is present, and unloads that compartment of the knee. Dr. Drez testified that while Claimant wore the brace, he reported minimal symptoms. CX 3, p. 11.

Dr. Drez ordered a bone scan and reviewed the associated report on January 10, 2001 which confirmed his clinical impression that there was mild increased uptake in the left knee in both the tibia and the femur, most likely due to arthritis. On February 13, 2001, Dr. Drez recommended a valgus osteotomy because Claimant had an arthritic condition on the inner aspect of his knee. Because Claimant reported relief with the unloader brace, Dr. Drez could perform an operation which unloaded the medial compartment of the inner aspect of the knee by changing the alignment of the extremity. Dr. Drez said he would not have performed that operation if the unloader brace did not provide relief for Claimant. He explained that Claimant had a mild degree of bowleg deformity with arthritic changes on the inner aspect of the knee, so the operation performed is to simply cut the bone and performing an opening wedge osteotomy, which makes the patient go from a bowlegged position to a knock-knee position, in other words, pushing the

knee out. Dr. Drez felt the chance of success with the operation was about eighty percent, but if the procedure was not successful, Claimant would have been rendered worse that he was initially. CX 3, pp. 12-13. The valgus osteotomy was performed on April 19, 2001, and Claimant was instructed to use crutches and perform only non-weight bearing activities for six weeks. CX 4, pp. 31-32.

On June 6, 2001, Dr. Drez noted that Claimant was seven weeks post-surgery, and he reported some discomfort and popping, but no pain, catching, swelling or grinding. Dr. Drez recommended that Claimant begin physical therapy. CX 4, p. 33. Dr. Drez removed the hardware from Claimant's osteotomy on August 15, 2001. CX 4, p. 34. On August 23, Dr. Drez indicated that Claimant could increase his activity as tolerated, but continued to be disabled from returning to full work. CX 4, p. 35.

In Dr. Drez's note dated November 27, 2001, he stated that the x-rays showed excellent healing from the osteotomy. He did not believe Claimant was capable of returning to offshore work and recommended another FCE which was conducted on December 4, 2001. After reviewing the FCE report on December 13, 2001, Dr. Drez agreed with the recommendations contained in the report including: Standing briefly after thirty to forty-five minutes, allowing continued sitting, avoiding standing beyond an occasional basis, that Claimant be allowed to sit briefly after every fifteen minutes of continuous standing, avoid walking of any significant degree, avoid squatting and crouching, avoid kneeling on the left, avoid climbing ladders to climbing ladders being done only rarely, avoid wet, slippery, uneven surfaces, avoid running or quick foot movements, limit lifting to light levels with no lifting beyond knuckle level, limit carrying to fifteen pounds. He determined that Claimant had reached maximum medical improvement. CX 4, p. 36. Dr. Drez testified that he continued to agree that the restrictions were appropriate for Claimant.

Claimant underwent another hardware removal procedure on June 3, 2002. On June 6, x-rays showed no evidence of retained hardware or complications. CX 4, p. 38. At Claimant's visit on June 27, Dr. Drez recommended he progressively increase his activities as tolerated and opined that Claimant would likely need a total knee replacement within the next year. CX 4, p. 39. Claimant returned for several follow-up visits where he continued to complain of persistent pain. On October 1, 2002, Dr. Drez indicated that Claimant would return in January 2003 to schedule a total knee replacement. On November 5, 2002, he stated that Claimant could return to sedentary work at any time. CX 4, p. 40.

On January 2, 2003, Dr. Drez examined Claimant, who continued to complain of pain but noted that it was controlled with mild analgesics. Dr. Drez opined that at that time, Claimant's pain was not severe enough to warrant a total knee replacement, and if he had the procedure done, it was likely that he would eventually require another because of his age being only 59. On March 31, 2003, and July 27, 2003 Dr. Drez indicated that he approved two front desk clerk positions which entailed answering telephones, providing customer service to patrons and checking guests in and out of the motel. CX 4, p. 41.

Claimant returned on October 2, 2003, continuing to complain of pain. Dr. Drez indicated that Claimant had established degenerative arthritis in his left knee and recommended Synvisc to reduce joint pain. He stated he would see Claimant for a follow-up visit in one year. On October 16, 2003, Dr. Drez approved an Activations Specialist position at U.S. Unwired which involved handling sales of pager activations, communicating with all salespeople and agents.

Dr. Drez stated the last time he prescribed medication to Claimant was on January 2, 2003, which was a prescription for Darvocet N100, thirty tablets, no refills. He recalled that Claimant contacted him requesting pain medication but Dr. Drez refused to provide more narcotics. The last time Dr. Drez saw Claimant was October 2, 2003, where he provided injections of Synvisc, a hyaluronan, a natural product secreted by the fluid in the knee joint. Individuals with arthritis have a deficiency of the product in the knee joint. When it is injected, it adds increases of viscosity, the fluid in the joint.

Dr. Drez opined that if Claimant continued to have problems with his knee, it would not hurt to use the unloader brace, but Claimant had the osteotomy which in effect does the same thing the unloader brace does. Dr. Drez felt the osteotomy was successfully performed in that it took the pressure off the inner aspect where the degenerative arthritis was the worst, though it did not relieve all of Claimant's pain. CX 3, p. 18. Claimant asked Dr. Drez about a joint replacement, but Dr. Drez told him he should exhaust all other methods of treatment first, because at Claimant's age the risk of the joint wearing out would be greater than if he waited until he was older. CX 3, p. 19.

Dr. Drez agreed that on March 31, 2003, he felt Claimant was capable of performing a front desk clerk position at a hotel. CX 3, p. 21. He also believed Claimant could perform the work of an activation specialist at a paging company, which is similar to a dispatcher-type job. He similarly believed that Claimant was capable of performing a gate guard position. CX 3, p. 23. Dr. Drez opined

Claimant could perform sedentary employment, eight hours per day. He based his opinion on his evaluation of Claimant, as well as the FCEs which were performed. CX 3, p. 22. Dr. Drez opined that any differences noted between the FCE performed in November 2001 and the one performed a year and a half prior to that, would be secondary to the progressive arthritic wear that would occur over time in an individual with arthritis. CX 3, p. 23.

Dr. Drez stated that he had not observed anything, nor had anything occurred, since the last time he saw Claimant which would indicate that Claimant could not perform the positions which Dr. Drez had approved. Dr. Drez believed all five of the surgeries he performed on Claimant accomplished what he set out to do, except for relieving Claimant's pain. Dr. Drez was aware of Claimant's pain based on Claimant's statements regarding his levels of pain, but saw nothing objective which would indicate that the surgeries did not accomplish what they were supposed to. CX 3, p. 24.

Claimant returned to Dr. Drez on May 27, 2004, where he presented with continued pain with weight bearing. Dr. Drez administered the first in a series of five Hyalgan injections to the left knee joint, and subsequently administered the remaining injections on a weekly basis. On June 3, Claimant reported his pain as "slightly better," but on June 10 he indicated that his pain had not significantly changed, and at the fourth and fifth injection, Dr. Drez noted that Claimant had received minimal benefit from the injections. CX 9, pp. 4-5. On September 23, 2004, Dr. Drez noted that Claimant was not ready for a total knee replacement but did believe he would require one in the future. CX 9, p. 2. On March 29, 2005, Claimant reported continued pain with popping. Dr. Drez noted activity related swelling and observed Claimant was using a cane. Dr. Drez indicated that it was Claimant's decision when to undergo a total knee replacement when his quality of life became significantly affected. He instructed Claimant to return in six months for a follow-up visit. CX 9, p. 1.

Dr. Drez stated there was "no question" in his mind that Claimant was experiencing pain. CX 3, p. 32. Dr. Drez explained that his philosophy on narcotic medications for pain is that he will not prescribe them, a patient must seek out pain management. On occasion, he has recommended long-term pain management programs, but stated he has "some concerns" about such programs. Dr. Drez stated the best thing Claimant could do to alleviate pain is to decrease the loading across his joint. He said he expects a direct correlation between the amounts of walking, standing, or weight bearing Claimant performs and the pain he experiences as a result. CX 3, p. 34.

Regarding the surgeries he performed on Claimant, Dr. Drez estimated that Claimant would have been disabled from the first arthroscopy from four to six weeks, and the second procedure would have been the same amount of recovery time. Claimant would have taken about six months to fully heal from the osteotomy, and two to three weeks of disability would have followed each hardware removal procedure. CX 3, p. 35.

Dr. Drez opined with reasonable medical probability, that Claimant will require a joint replacement at some time to relieve or diminish his pain. Dr. Drez stated that in most cases, an individual can delay surgery by limiting his abilities severely. He believed if Claimant must have a total knee replacement, he will be disabled from work for between three to six months. Dr. Drez could not predict when knee replacement surgery would occur. One of the reasons he recommended Synvisc injections was because they can reduce pain. A joint replacement surgery is performed only because an individual's pain is of such a degree that all other treatment methods have failed. CX 3, p. 37.

Dr. Drez agreed that pain alone can be disabling from the standpoint of interfering with daily activities at work and at home. He opined that it is unlikely, even with knee replacement surgery, that Claimant will ever be completely pain free, because pain is subjective and many people who have had joint replacement surgery continue to experience aching in their joints, weather-related discomfort, and the inability to walk as far as they used to. He explained that joint replacement is performed to relieve the pain so it is at a tolerable level. Dr. Drez felt it was appropriate for Claimant to delay knee replacement surgery as long as he is able to tolerate his condition.

On redirect, Dr. Drez stated he did not consider Claimant to be totally disabled from performing some type of employment. He did not feel that Claimant's complaints of pain were elevated in relation to the amount of arthritis Claimant had. He opined that a total knee replacement would reduce Claimant's pain considerably. He clarified that when he said Claimant could limit the loading of his joint by not walking, he did not mean to say that Claimant could not be employed in the jobs he previously approved. CX 3, p. 44. Dr. Drez stated he would rather Claimant try Synvisc injections before attempting pain management.

Vocational Evidence

Deposition and Reports of Scott Landry, M.S., C.R.C.

Mr. Landry, a licensed vocational rehabilitation counselor, was deposed on May 27, 2004.[3] His deposition is located at Employer's Exhibit 5; his records are found at Employer's Exhibit 6. Mr. Landry initially met with Claimant on April 11, 2002 to perform an assessment, and administered a Career Assessment Inventory, a Wide Range Achievement Test (WRAT), and a Transfer of Skills Analysis. EX 5, p. 7. The WRAT results indicated that Claimant performed at a sixth grade reading level, a fourth grade spelling level, and a fourth grade math level. EX 6, p. 38.

On May 9, 2002, Mr. Landry and Claimant completed an individual rehabilitation plan, which Mr. Landry described as a document which details the responsibilities of the injured worker and the vocational counselor. EX 6, pp. 45-46. Mr. Landry said Claimant signed the document in his presence, which indicated that Claimant agreed to perform independent job search activities two hours per day, three days per week. Mr. Landry provided Claimant with blank job search worksheets upon which he was to document any contact with potential employers.

Mr. Landry located potential employment for Claimant on February 17, 2003, specifically, a front desk position at Holiday Inn Express in Sulphur, Louisiana. Mr. Landry contacted the potential employer and spoke with Aaron Nichols, who informed him of the job duties, qualifications, required skills, physical demands, wage, and method of application. Mr. Landry said the position was sedentary, did not require lifting more than ten pounds occasionally; bending, squatting and stooping were performed rarely to occasionally, sitting was performed occasionally to frequently, intermittently; standing and walking were performed occasionally, intermittently, and breaks were provided in between customers. The position paid $6.50 per hour, and was available thirty-two hours per week. EX 6, p. 72; EX 5, p. 28.

Mr. Landry sent a letter to Claimant on February 17, suggesting that he contact the employer within twenty-four hours. He later learned that Holiday Inn still had a current opening for desk clerk in June 2003. He contacted Claimant, told him the position was still available, and encouraged him to resubmit his

[3] Mr. Landry worked with Claimant for some time, but was called to active military duty on May 15, 2004. He currently remains on active duty. EX 5, p. 5.

resume. EX 5, p. 30. The position was again found to be available on December 17, 2003. EX 5, p. 82. Dr. Drez approved this position on March 31, 2003. EX 5, p. 83.

In June 2003, Mr. Landry identified another potential employment position for Claimant. The Super 8 Motel was hiring a desk clerk whose duties, Mr. Landry learned from contact with Nick Zaver at Super 8, included answering phones, providing customer service, and checking patrons in and out of the motel. This was a sedentary position, the employer provided a chair for sitting and the worker could sit at his own election which Mr. Landry explained meant that there were tasks that he could perform while seated, but the worker would not always be able to sit. Lifting was limited to less than ten pounds occasionally, sitting and standing was performed occasionally to frequently, standing and walking was performed occasionally to intermittently. Neither a high school diploma nor a GED was required, and on the job training was provided. The position paid $6.00 to $6.50 per hour, depending on experience, and was available forty hours per week. EX 6, p. 79. On June 23, 2003, Mr. Landry alerted Claimant by letter of the position and encouraged him to apply. EX 6, p. 80. Dr. Drez approved this position on July 27, 2003.

Mr. Landry identified an activations specialist position at U.S. Unwired on September 19, 2003. The worker in this position would handle the sale of paging activations, communicate with all salespeople and agents concerning additional information. This was a sedentary position which required no lifting or carrying, and the worker would sit on a frequent to continuous basis. EX 5, p. 39; EX 6, p. 87. Dr. Drez approved this position on October 16, 2003. EX 6, p. 87.

On cross-examination, Mr. Landry stated that he had not reviewed Dr. Drez's deposition. He agreed that if Claimant underwent a total knee replacement, it would have an impact on employment. He explained that the activations specialist position at U.S. Unwired did require some technical skills, including entering information on the computer, which would be performed after on the job training, and familiarity with cellular phone plans. He opined that Claimant could quickly be "brought up to speed" on these matters. EX 5, p. 52. Mr. Landry acknowledged that Claimant's use of a cane may have some negative connotations to some potential employers, but he usually counseled people on how to deal with using a cane in the workplace. EX 5, p. 55.

Daphaney J. Alexander-Johnson, M.S., C.D.M.S., C.C.M.

Ms. Johnson, another vocational rehabilitation counselor hired by Employer, sent correspondence to Dr. Drez on February 11, 2004, indicating that she had located several potential employment positions for Claimant, and on February 28, 2004, sent a letter describing the positions to Carrier. These positions included dispatcher at Northeast Texas Emergency Medical Services, the position did not require experience and the employer was willing to train for this sedentary position located in Jasper, Texas. EX 8, p.2. Also identified was a delivery driver for Domino's Pizza in Jasper. This position carried a "light" physical demand level, and required the worker to deliver products to customers. The position involved money handling and customer service. EX 8, p. 4. Ms. Johnson located a motel desk clerk position at Chateau Inn in Jasper, which was also classified as light in nature, and involved greeting and assisting customers with check-in and check-out, money handling, general clerical work, and information gathering. EX 8, pp. 3, 7.

On April 19, 2004, Ms. Johnson located additional employment "leads" which she enumerated in a letter to Carrier. These leads included motel desk clerk at Ramada Inn in Jasper, Texas, cashier at Lowe's in Jasper, cell phone salesperson at Wal-Mart in Lumberton, Texas, auto sales/management at Auto Zone in Beaumont, Texas, and cashier at Home Depot in Orange, Texas. EX 8, pp. 15-16.[4]

Testimony of Carla D. Seyler, M.S., C.R.C.

Ms. Seyler was asked by Employer to perform a vocational evaluation of Claimant and conduct job placement activities in June 2004. Ms. Seyler recalled that Claimant's attorney would not allow Claimant to meet with her, so she used the materials provided to her to conduct her evaluation, including depositions of Claimant, Dr. Drez, and Mr. Landry, records of Ms. Johnson and Mr. Kramberg, Claimant's personnel file and the results of his FCE conducted on December 4, 2001. Ms. Seyler issued a report on July 20, 2004 which contained the evaluation and a labor market survey. Tr. 106; EX 28.

The labor market survey identified five positions in Orange, Texas, and the surrounding area, where Ms. Seyler understood Claimant to live at the time the report was compiled. When she contacted Claimant's attorney, he did not inform her that Claimant had relocated to Louisiana. EX 28, p. 4. One of the positions identified by Ms. Seyler was for a traffic attendant at a large institution. She deemed this position appropriate for Claimant because it was an unskilled job,

[4] No physical requirements were provided for these employment leads nor is there any indication that the leads were further investigated as this is the last record in Ms. Johnson's materials.

where on the job training was provided, which required the worker to take money from customers as they entered the lot, and the flat fee was two dollars. The worker would be required to make change but the register provided that information. The worker would also have to balance the drawer at the end of the day which involves counting money and comparing the amount to the amount taken in that day. The position was sedentary in nature and the employer had hired two to three times in the previous year. Tr. 106. The worker could sit or stand as needed, and an individual who used a cane could be hired. Lifting did not exceed ten pounds. EX 28, p. 4.

Ms. Seyler also identified a gate guard position which she deemed appropriate because it was an unskilled to semi-skilled position. The worker may have had to write reports, but could receive assistance. The job could be performed while sitting and the worker could stand periodically, and the worker had the ability alternately sit, stand, or walk and sit frequently in the booth. Ms. Seyler said the employer hired every few months for this position and had hired the week before the hearing. Tr. 107. Lifting was less than ten pounds and consisted of an entry log. An individual could use a cane while performing this job, on the job training was provided, and wages were $7.00 to $8.00 per hour. EX 29, p. 4.

A greeter position was located where the worker would greet customers upon entry into a retail establishment. Ms. Seyler said the position was unskilled, and was an entry-level position which could be performed without any prior training or background. The employer was willing to allow the worker to use a cane and a stool. The worker typically had a 1.5 hour shift followed by a fifteen minute break, and lifting was less than ten pounds. The employer hired three full-time and four part-time workers in 2003 and two full-time and four part-time workers in 2004. The employer hired most recently in January 2005. Wages for this position were $5.15 per hour. EX 28, p. 4.

A customer service representative position was identified at Transit Mix in Beaumont, Texas, which involved answering incoming calls to assist customers with placing orders at a construction company. EX 28, p. 4. Ms. Seyler said that some of the skills Claimant learned while working for Employer would benefit him in this position, in terms of placing orders, providing general information and being able to provide pricing information. The employer provided on the job training for its computer system, which was used to perform basic data entry and retrieval. The position was sedentary, the worker could use a cane, and walk or stand up when he needed to. The employer would consider an applicant without a

high school diploma. The employer hired twice in 2004 and once in 2005. Tr. 110. The position paid $7.50 per hour. EX 28, p. 5.

A cashier position was available at Conn's Appliances, where the worker would accept payments from customers, answer incoming calls, take messages, direct calls, verify delivery checklists, review paperwork, complete basic reports, and balance a cash drawer. EX 28, p. 5. An individual without a high school diploma would be considered. The applicant was required to interact appropriately with customers. The worker would be able to sit and the cash register was computerized. Wages for this position were $7.00 per hour. EX 28, p. 5.

Ms. Seyler reviewed Claimant's personnel file and opined that the material she saw did not reflect a second grade reading comprehension level. Tr. 111. She noted that the fact that new equipment came in to the rigs and Claimant had to be trained reflected a level of complexity where the safety of other people depended on Claimant's ability to understand the information.

Ms. Seyler reviewed the positions identified by Mr. Landry and contacted the potential employers. She said Holiday Inn, now Quality Inn, had current openings for a desk clerk for the morning and evening shifts. The worker was able to stand for four to five hours in an eight hour shift, and could sit intermittently throughout the shift. There was an office with a stool located less than ten feet from the front desk, so the worker had ready access to somewhere to sit. Ms. Seyler said that the desk clerk position at Super 8 Motel required basic computer skills, and while she believed this was something Claimant could learn, she did not believe he possessed such skills. Tr. 113. Ms. Seyler said if Claimant made an effort, there was nothing she saw in the records which would prevent him from obtaining a GED. Regarding Claimant's ability to work with the public, Ms. Seyler noted that Employer offered him a promotion into a supervisory position, where he would have to communicate with others.

Ms. Seyler explained that her attempts to locate potential employment for Claimant were centered around Orange, Texas because she believed Claimant was living there at the time. She was aware, however, of jobs which fit within Claimant's limitations in the Sulphur and Lake Charles, Louisiana area, including a cashier at United Artists movie theater, which she had identified while working for a client with more significant mobility impairments than Claimant. She explained that Lake Charles is a larger labor market than Orange and Beaumont, Texas, and there would be more jobs available to Claimant. Tr. 116.

On cross-examination, Ms. Seyler agreed that when she completed her July 20, 2004 report, she did not identify any specific employers, which she explained is normal office procedure. She said if she is providing direct job placement services to an individual, she will identify specific employers. Tr. 119. When asked why the dates of availability of the jobs she identified preceded the date of her report, Ms. Seyler explained that her office maintains a job bank, but the employers were contacted specifically for Claimant. Tr. 122.

Ms. Seyler explained a notation found under the greeter position description. The position had been dated January 2002 but was updated on July 8, 2004. The description originally indicated that the job required no heavy lifting, not over twenty pounds, but in July 2004, the same description indicated lifting as less than ten pounds. Ms. Seyler explained that in July her office learned that the employer could accommodate an individual who could not lift more than ten pounds. Tr. 123.

Regarding positions where Claimant would be required to "deal with the public," Ms. Seyler opined that Claimant had the skills necessary to communicate with others. She further noted that he was able to complete simple records, read gauges, count, add and subtract, and recognize letters. She recalled that Mr. Landry's testing of Claimant revealed a phonetic reading level of sixth grade and a spelling and math level of fourth grade, and she believed these skills were satisfactory for Claimant to perform unskilled or semi-skilled jobs as they are practiced in the labor market. Tr. 126-127. Ms. Seyler opined that the tests administered by Mr. Landry produced results which were more consistent with the skills and abilities Claimant demonstrated in his work for Employer.

Regarding the cashier position Ms. Seyler identified at United Artists movie theater, she explained that the employer offered four, five, six and eight-hour shifts. She agreed that the description of the Traffic Attendant position indicated that the employer required a high school education or equivalent, but explained that in July 2004 the notation was updated to state that the employer would consider an applicant without a high school diploma or GED provided he had a stable work history. Tr. 132. The security guard position similarly indicated that a high school diploma or GED was required, but in July 2004, that notation was scratched out and changed to "preferred." Ms. Seyler said that her office asks the employer if it would consider someone without a diploma or GED. Tr. 133. She clarified that for the security position, an applicant could be given a more sedentary position if when he applied he presented the fact that he needed a sedentary position.

Ms. Seyler said that the customer service position at Transit Mix included maintaining account records as a job task. She agreed that the position description listed qualifications including good verbal and written communications, and that basic keyboard knowledge was preferred, but the applicant could be trained. Ms. Seyler said that on-the-job training was provided; the original description indicated that a high school diploma or GED was required but when follow-up was made for Claimant, the employer indicated that it would consider an applicant without a GED. Tr. 136.

Ms. Seyler explained that the five positions she identified for Claimant were initially potentially suitable, so the employers were contacted to determine whether the positions would be suitable for Claimant, and in Ms. Seyler's opinion, they were. Tr. 138. When asked what impact Claimant's need for continuing medical treatment would have on future employment, Ms. Seyler explained that the records indicated that Claimant had been seeing his physician approximately once every six months, which she did not view as significantly impacting his ability to find a job. She said if Claimant undergoes a knee replacement surgery, it may be a problem for some employers, but stated that jobs similar to those she identified are available frequently, though she agreed that if Claimant told a potential employer that he was to undergo surgery in a week, he may not be hired. Tr. 138.

Testimony of William J. Kramberg, L.P.C., C.R.C.

Mr. Kramberg was retained by Claimant's counsel to perform a vocational assessment of Claimant and an analysis of the work of several vocational rehabilitation specialists who had worked with Claimant. Mr. Kramberg met with Claimant once for several hours. Tr. 75.

Mr. Kramberg issued his first report on May 20, 2004, an additional report on June 4, 2004, and subsequently received Claimant's personnel information on June 15, 2004, thus his reports did not consider Claimant's personnel information. Tr. 80. Subsequent to meeting with Claimant, Mr. Kramberg contacted the potential employers identified by Mr. Landry. He learned from Holiday Inn that no experience was required, that the employer would train the worker, the applicant needed to be able to read, write and spell, extensive standing was required, and high school or equivalent education was preferred but not required. Tr. 86. Mr. Kramberg felt this position was inappropriate for Claimant because of his academic deficits in reading and spelling, and the extensive standing which was required. Dr. Drez had restricted Claimant to a "sedentary type job" which Mr. Kramberg did not equate with standing for eight hours per day. Mr. Kramberg

asked whether a worker would be allowed to sit and was told whatever sitting could be done would be "incidental." He did not inquire as to whether a stool could be used. Tr. 88.

Mr. Kramberg contacted Motel 8 and was told that the worker would need to be on his feet as necessary throughout the day, that front desk experience was required, and that a complicated computer system was used in the motel. The applicant needed to possess basic computer skills, the ability to read, spell, and deal with the public. Tr. 88. Mr. Kramberg opined that the position was inappropriate for Claimant for a variety of reasons: dealing with the public and providing customer service would be different that dealing with the public offshore on a rig.

Mr. Kramberg stated that Claimant's math deficits may be an issue if he were placed in a position such as parking lot attendant, if he had to make change repetitively. Mr. Kramberg acknowledged that Claimant performed addition and subtraction correctly on the test administered to him by Mr. Landry. Tr. 95. Mr. Kramberg said Claimant is a personable man of average intelligence, and was apparently a dedicated employee who performed his job well. Mr. Kramberg administered a reading comprehension test which indicated Claimant's reading ability was at Grade 2.2 level. He opined that Claimant was able to "learn by doing" while working for Employer, but he had no transferable skills with regard to sedentary work. Tr. 102.

Mr. Kramberg testified that he did not believe any of the potential employment positions identified by Mr. Landry, Ms. Johnson, or Ms. Seyler were suitable for Claimant. Tr. 145. Mr. Kramberg felt that the jobs identified in Mr. Landry's report were unsuitable for a "variety of reasons including their physical demands and skill requirements as well as Claimant's literacy deficits." Tr. 147; CX 5, p. 3.

Mr. Kramberg also disagreed with Ms. Johnson's findings. He contacted two of the stores she identified as potential employers and determined that neither were appropriate positions because of the physical demands, particularly lifting and the requirement of walking throughout the day. CX 8, p. 1. He noted that Claimant lacked the basic reading ability and keyboard skills the positions required, and had not functioned in a job which required communication skills and/or public contact. Further, the jobs Ms. Johnson identified were located in Jasper, Texas, which is sixty-five miles each way from Orange, and Center, Texas, located one hundred and thirty miles each way from Orange. Tr. 147-149.

In his third report, dated April 5, 2005, Mr. Kramberg opined that given Claimant's age, lack of formal education, literacy deficits, lack of transferable skills, restriction of sedentary work and impending total knee replacement, Claimant's return to competitive employment was "not within vocational probability." Tr. 148; CX 10, p. 2. He disagreed with Ms. Seyler's opinion regarding Claimant's employability, specifically noting that one of the positions she identified required significant customer service and computer skills, while another, Conn's Appliances, required pre-employment testing or screening on a standardized instrument which required reading comprehension levels at the sixth grade level or above.

Mr. Kramberg contacted Sam's Club regarding the greeter position identified by Ms. Seyler. He said the personnel department indicated that Greeter was a "very low turnover job," and the applicant typically hired is one who already works in the store. Mr. Kramberg was informed that the worker would be required to stand at the door while greeting customers, would retrieve shopping carts, clean windows, and check receipts for exiting customers. He was told that it was difficult for workers to sit at the door due to the other tasks required of them. He was also told that a high school diploma or GED was not required. Tr. 150. After reviewing Dr. Drez's deposition, Mr. Kramberg did not believe that Claimant would be physically able to perform the Greeter position.

Mr. Kramberg deemed the traffic attendant position at St. Elizabeth's Hospital inappropriate because he was told that a high school diploma or GED was required and that cash handling experience was preferred. He said otherwise, the position is sedentary. Tr. 151. Mr. Kramberg contacted Delta Security regarding the security guard position and was told that a high school diploma was preferred, not required. He said the position was essentially "light" in nature and there was not a great deal of heavy lifting. Mr. Kramberg was told that the majority of positions were walking post jobs where the employee "makes the rounds," and they are on their feet up to thirty minutes per hour. He was told that less than two percent of Delta's positions were gate guard, sedentary type jobs. It was relayed to Mr. Kramberg that an individual must pass a Texas State examination for licensure in order to be permanently hired, that reading and spelling were important, and workers must have been able to read posted instructions and complete reports. Tr. 154.

Mr. Kramberg was told by Transit Mix that a high school diploma or GED is typically required for a customer service position, that the applicant must possess

good communication skills, the ability to deal with customers, perform scheduling, maintain records, knowledge of the concrete and/or aggregate industry was "a plus," and that the applicant needed keyboard and software skills along with good reading and spelling skills. Tr. 154-155. Mr. Kramberg said that Conn's Appliance, which had an available cashier position, tested all of its applicants and administered a personality survey. Tr. 155.

On recross, Mr. Kramberg explained that the Wunderlich screening test, utilized by Conn's Appliances, is a personnel test which has components of both mental ability as well as academic skills. Tr. 160. Regarding the traffic attendant position, Mr. Kramberg agreed that he did not ask the employer whether high school or GED was required if the applicant had a stable work history. Mr. Kramberg was not informed that the cashier machine Claimant would use in that position would instruct him what the correct change was. Mr. Kramberg admitted that Delta Security informed him that it was accepting applications for sedentary positions and would be hiring in the short term. Tr. 163.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Greenwich Collieries (Maher Terminals)*, 512 U.S. 267, 28 BRBS 43 (1994), that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates Section 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (1994).

The Parties' Contentions

Claimant asserts that he has established a *prima facie* case of total disability, and therefore, Employer/Carrier must shoulder its burden of establishing the availability of suitable alternative employment. Claimant contends that Employer/Carrier has failed to establish suitable alternative employment, considering Claimant's education and physical restrictions, as evidenced by Mr.

Kramberg's testimony regarding all of the positions identified by Employer/Carrier. In the alternative, Claimant argues that should suitable alternative employment have been found to be established, he should be deemed permanently totally disabled from the date he reached maximum medical improvement until the time suitable alternative employment was identified.

Employer/Carrier, on the other hand, contend that suitable alternative employment has been overwhelmingly established through the reports of three vocational rehabilitation counselors. Employer/Carrier assert that eight suitable job opportunities have been identified and Claimant applied for only one position. Employer/Carrier argues that suitable alternative employment has been established through multiple positions which Claimant could have secured had he attempted to do so.

Causation

Section 20(a) of the Act provides a claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm, and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp*., 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Building Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial evidence to the contrary. 33 U.S.C. §§ 902(2), 903; *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. *Sprague v. Director, OWCP,* 688 F.2d 862, 865 (1st Cir. 1982). If the employer meets its burden, the Section 20(a) presumption is rebutted and disappears, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935). In this case, the parties agree that Claimant suffered an injury in the course and scope of his employment on May 14, 1999, a stipulation which I find is supported by the evidence.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Id.* at 60. Any disability before reaching MMI would thus be temporary in nature. The parties have stipulated that Claimant reached maximum medical improvement.[5] Dr. Drez is Claimant's treating physician and his opinion that Claimant reached MMI on December 13, 2001 is unrefuted, therefore, I accept the parties' stipulation. Any disability after December 13, 2001, is permanent in nature.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment due to his work related injury establishes a *prima facie* case of disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 420, 24 BRBS 116 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 24 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

Here, the parties agree, and there is no suggestion that Claimant is capable of returning to his previous employment as an offshore mechanic. I accept this stipulation, for it is supported by the testimony of Claimant's treating physician. Accordingly, Claimant has demonstrated a *prima facie* case of total disability, and Employer/Carrier must establish the availability of suitable alternative employment.

[5] Dr. Drez's office note the day he deemed Claimant at MMI is dated December 13, 2001, (EX 3, p. 35) but the party's stipulation was that Claimant reached MMI on December 12, 2001. I accept Dr. Drez's report as controlling.

To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which the claimant is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992). However, for job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maint. Indus., Inc.*, 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *P & M Crane Co.*, 930 F.2d at 430.

If an injury occurs to a body part specified in the statutory schedule, then the injured employee is limited to the permanent partial disability schedule of payment contained in Sections 908(c)(1) through (20). The rule that the scheduled benefits are exclusive in cases where the scheduled injury, limited in effect to the injured part of the body, results in a permanent partial disability, was thoroughly discussed by the United States Supreme Court in *Potomac Electric Power Co. v. Director, OWCP*, 101 S.Ct. 509 (1980) (hereinafter *PEPCO*). However, a scheduled injury can give rise to permanent total disability pursuant to Section 908(a) in an instance where the facts show that the injury prevents a claimant from engaging in the only employment for which he is qualified. *PEPCO*, 101 S.Ct. at 514 n.17. Therefore, if Claimant establishes that he is totally disabled, the schedule becomes irrelevant. *Dugger v. Jacksonville Shipyards*, 8 BRBS 552 (1978) *aff'd* 587 F.2d 197 (5th Cir. 1979).

In this case, Claimant asserts that the schedule is inapplicable because he remains permanently totally disabled as Employer/Carrier failed to demonstrate suitable alternative employment. Employer/Carrier, on the other hand, contend that they have established suitable alternative employment by identifying eight positions which are suitable considering Claimant's age, education, physical restrictions and work experience. I agree with Employer/Carrier.

Mr. Landry identified a desk clerk position on February 17, 2003 at Holiday Inn Express in Sulphur, Louisiana. This position was sedentary and complied with the restrictions imposed by Dr. Drez on December 13, 2001. Further, Dr. Drez approved this position on March 31, 2003. Claimant submitted an application for the position, but testified that he followed up only once, one month after submitting the application. However, Mr. Landry was able to ascertain that the position was available again in June 2003 and December 2003. Ms. Seyler testified that the position was available at the time of the hearing.

Claimant relies heavily on the testimony of Mr. Kramberg, who opined the desk clerk position was inappropriate for Claimant because of Claimant's educational deficits and the position's requirement of "extended standing." However, Mr. Kramberg admitted that he was told that the position did not require a high school diploma or GED and on-the-job training was provided. Claimant has a very stable and successful work history, where he was required to read information, take exams, become certified in machinery operations, and write reports, and was even offered a foreman position. Also, Dr. Drez approved the desk clerk position after he read the position's physical requirements.

Though Mr. Kramberg testified he was told that Claimant would be required to stand on his feet for "eight hours" in the desk clerk position, he admitted that he did not ask if a stool could be utilized, unlike Ms. Seyler, who was told that a stool was located less than ten feet from the front desk, and that Claimant would only stand for four to five hours in an eight-hour shift. Consequently, given the foregoing, and the fact that Dr. Drez's opinion that Claimant was capable of performing the position is uncontroverted medically, I find that this position constituted suitable alternative employment.

Dr. Drez also approved two other positions: desk clerk at Super 8 Motel and activations specialist at U.S. Unwired. I find that the desk clerk position constituted suitable alternative employment, for the same reasons set out above. Mr. Landry testified that the positions at Holiday Inn and Motel 8 were very similar. Motel 8 provided a chair for the worker to sit in and he was allowed to sit.

Sitting was performed occasionally to frequently, and standing and walking were performed occasionally intermittently. Dr. Drez approved this position on July 27, 2003. Mr. Kramberg testified that this position required use of a complicated computer system, but Ms. Seyler believed that Claimant could be taught how to use the computer, given his proven mechanical skills.

Subsequently, Ms. Seyler identified five potential employment positions. Of these, I specifically find that Claimant was realistically capable of performing the Gate Guard. The Gate Guard position was sedentary, adhered to Dr. Drez' restrictions. Though Mr. Kramberg testified that he was informed that less than two percent of Delta Security's positions were sedentary, he admitted on cross-examination that Delta informed him that it was taking applications for sedentary positions and would be hiring shortly.

Of all these jobs, Claimant submitted an application for one identified position, and did not engage in independent job searching or following up with employers. Therefore, I do not find that Claimant engaged in a diligent search for employment.

Because Employer/Carrier identified suitable alternative employment effective February 17, 2003, Claimant is relegated to the scheduled award.

ORDER

It is hereby ORDERED**, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for permanent total disability benefits from December 13, 2001, the date of maximum medical improvement, to February 17, 2003, the date suitable alternative employment was identified, based on an average weekly wage of $1,302.48;

(2) Employer/Carrier shall pay to Claimant permanent compensation commencing February 17, 2003, the date suitable alternative employment was identified, for 74.88 weeks, for 26% impairment to his lower left extremity, based on an average weekly wage of $1,302.48;[6]

[6] Section 908(c)(2) provides 288 weeks of compensation for the loss of use of a leg, 26% of 288 equals 74.88.

(3) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(4) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(5) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(6) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 28th day of June, 2005, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:bbd